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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 989

BILLY BAXTER, INC.,

Petitioner,

against

THE COCA COLA COMPANY and
CANADA DRY CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Docket No. 34072

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Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956) 7,8

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South Carolina Council of Milk Pro
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Other Authorities:

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(Docket No. 34072)

Petitioner Billy Baxter, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on August 25, 1970.

CITATIONS TO OPINION BELOW

The opinion of the District Court for the Southern District of New York is reported at 47 F.R.D. 345 (S.D.N.Y. 1969) and is printed in Appendix A hereto, infra pp. A1. The opinion of the United States Court of Appeals for the Second Circuit is reported in F.2d-and is printed in Appendix B hereto, infra, pp. B1.

JURISDICTION

The judgment of the U. S. District Court for the Southern District of New York herein was entered on the 28th day of May, 1969, a copy of which is printed in Appendix C hereto, infra, p. C1. Petitioner's Motion for Reargument in the District Court was denied by order entered July 16, 1969. Said order is printed in Appendix D hereto, infra, p. D1. Petitioner's Notice of Appeal was filed on August 13, 1969, and is printed in Appendix E hereto, infra, page E1.

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 25, 1970. Said judgment is printed in Appendix F hereto, infra, page F1.

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The Courts below granted defendants' motion for summary judgment and sustained the dismissal of petitioner's claim for violations of the antitrust laws. Petitioner had alleged itself to be a franchiser-licensor of Billy Baxter Beverages which had been sold under federally registered trademarks since 1900. In its efforts to expand its beverage line into new markets, petitioner was injured by defendants' illegal division of the soft drink market. In dismissing petitioner's suit the Courts below held that as a matter of law petitioner lacked standing to bring its action under the antitrust laws.

The issues on this appeal arise out of the Court of Appeals and District Courts' conclusions with respect to a franchiser's standing to sue under the Clayton Act Section 4, 15 USC Section 15. These issues are:

1. Does a trademark franchiser-licensor who supplies ingredients and promotional and advertising support to its franchisees lack standing to sue under the Clayton Act?
2. Is the intended target of antitrust violations motivated by reason of the fact that it is a franchiser?
3. Has the Court below imposed a burdensome restriction on private antitrust litigants which render ineffective the antitrust laws in the private sector?
4. Was the granting of summary judgment and the denial of petitioner's motion to amend its complaint appropriate in a complex antitrust action?

STATUTES INVOLVED

The statutory provisions involved are Section 4 of the Clayton Act, 15 USC Section 15, 38 Stat. 731 which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damage by him sustained, and the cost of suit, including a reasonable attorney's fee."

and the Federal Rules of Civil Procedure, Rules 56 and 15.

BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

The basis for federal jurisdiction herein is 28 USC Section 1337.

STATEMENT

The parties each hold federally registered trademarks for noncarbonated beverages substantially identical with their tradenames.

A Pennsylvania corporation, Plaintiff was organized in 1962 to purchase the Billy Baxter trademark and the formulas for products which have been sold continuously since 1889. After its organization, Plaintiff announced that it was about to market its products nationally. Those products consisted of soda water, quinine water, lime'n quine (lime flavored quinine water), ginger ale, ginger beer, root beer and sarsaparilla. At that time plaintiff's market principally consisted of sales to Hotels, City Clubs, Country Clubs and such other institutions in the Pittsburgh metropolitan area.

Plaintiff's business consists of the purchase of secret flavor extracts and the sale of such extracts to independent franchised bottlers. The bottlers mix the extracts with simple syrup and carbonated water, bottle them and sell them under plaintiff's trademarks. Plaintiff also purchases bottled products bearing its trademark and sells them to retailers through its Beverage Sales Division.

Plaintiff retained the right under its franchising agreements to inspect its franchisees' bottling operations and control the production of the products bearing its trademarks. The significance of plaintiff's right to exercise "quality control" is sharply brought out in Judge Waterman's dissent. There he notes that failure to properly exercise such control may render the franchiser liable to the public. Appendix B, page B20.

In addition to supplying flavor extracts, the goodwill of its 47 year old trademark, and the continuous sale of its products since 1889, plaintiff also supplies centralized promotional and advertising services for the products sold under its trademarks.

Defendant Coca Cola Company's business consists of the manufacture of cola and fla[illegible]red syrup which is then sold pur-

suant to bottling franchise agreements to independent bottlers. Defendant's Cola and flavored syrup is mixed with carbonated water, bottled, and distributed under Defendant's federally licensed tradenames "Coke," "Coca Cola," and others.

In addition to supplying its bottlers with flavor syrup Defendant Coca Cola Company also supplies centralized advertising and promotional services for its products. The Coca Cola Company dominates the industry in the United States as a franchiser and bottler with sales in 1965 of more than $475 million.

Defendant Canada Dry's business consists of the manufacture and jobbing of flavor extracts which are then sold pursuant to bottling franchise agreements to independent bottlers. Defendant's flavor syrups are then mixed with carbonated water, bottled, and distributed under Defendant's federally licensed tradenames. Defendant Canada Dry Corporation also bottles and distributes bottled carbonated beverages in certain areas. The products distributed under Defendant's franchised bottling system include club soda, ginger ale, quinine tonic and soft drinks of various flavors.

In addition to supplying its bottlers with flavored syrup, Defendant Canada Dry also supplies centralized advertising and promotional services for its products. Canada Dry Corporation dominates the industry in the United States as a franchiser and bottler of mixers. Its sales in the United States in 1965 were more than $80 million.

The basic competition among the parties is at the level of selling of extracts and delivery of same to bottlers and the ultimate sale to consumers under the parties' various trademarks.

Plaintiff's business is not only substantially similar to that of both defendants, it is in many respects identical to other "names" in the nonalcoholic beverage industry, e.g., Seven-Up, which also does not manufacture, but purchases, flavor extracts.

In May of 1966 Petitioner commenced the within action in the United States District Court for the Southern District of New York charging violations of the Sherman, Clayton and Robinson-Patman Acts.

Plaintiff alleged that the Defendants have allocated to each other dominant positions in the nonalcoholic carbonated beverage industry of the United States, to wit: Coca Cola – flavored beverages; Canada Dry – noncola "mixers," e.g., club soda, ginger ale, quinine water, etc.

Plaintiff further alleged that defendants had conspired to exclude plaintiff from interstate commerce, had induced purchasers to exclude plaintiff's products through unlawful price concessions and discounts, had obstructed a proposed marketing program and had interfered with an attempt to sell plaintiff's business.

In the District Court defendants moved for summary judgment against petitioner on the grounds that there was "no genuine issue of material fact to be tried with respect to plaintiff's standing to sue and that as a matter of law the plaintiff lacks standing to sue." (Defendants' motion for summary judgment)

The opinion of the District Court in granting defendant's motion stated: "As a franchiser, plaintiff was outside of the target area for it did not produce, sell, purchase or lease the entire affected competing product in an independent capacity. It has long been held that, as a franchiser, it would be nonsuited" citation omitted, Appendix A, page A8.

The majority opinion in the Circuit Court affirmatively states the gravaman of this petition. There the Court unequivically enunciated the rule that even if defendants violated the law in a conscious effort to destroy the petitioner as a competitor, petitioner, as a franchiser, would lack standing to sue, Appendix B, page B10.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is directly in conflict with decisions of this Court and other Circuit Courts of Appeals, namely: *Perkins v. Standard Oil Company of California*, 395 U.S. 649(1969), *Radovich v. National Football League*, 352 U.S. 445 (1957), *Radient Burners Inc. v.*

Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), *Karseal Corp. v. Richfield Corp.*, 221 F.2d 359 (9 Cir. 1955), *Sanitary Milk Producers v. Berggians Farm Dairy, Inc.*, 368 F.2d 679 (8 Cir. 1966), *South Carolia Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir.) *Cert. denied*, 385 U.S. 934 (1966).

The foregoing cases are representative of the diversity of judicial opinion over standing to sue which prevails amongst the Circuits.

Some Circuits have adopted the "direct injury" test which has been characterized as:

> "...a talismanic rule of lack-of-standing, presumably based in some fashion upon those now famous words "by reason of." If the plaintiff suffers injury from the defendants' illegal antitrust conduct, but the plaintiff is somehow separated from the defendant by the presence of an intermediate person who has also fallen victim to that conduct, the plaintiff's injury is given the label of an "indirect," "remote," or "consequential" injury. The label then dictates the outcome of the case and the plaintiff is denied a recovery regardless of the extent or the nature of plaintiff's loss, or of any other facts or circumstances..." *Billy Baxter, Inc. v. The Coca Cola Company and Canada Dry Corporation* F.2d (2nd Cir. 1970) Appendix B, page B16.

This type of direct injury test, e.g., talismanic variety, is being applied in a number of Circuits including the Second. See: *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2nd Cir.), *Cert. denied* 395 U.S. 936 (1956) which was relied on heavily by the Court below.

This diversity of opinion has worked grave injustices to plaintiffs in certain parts of the country and promotes forum shopping. The failure of the Supreme Court to definitize a standing rule has left the Circuits in a state of indicisiveness. In this very case, defendants argued in the Circuit Court that:

> "If the Supreme Court intended to overrule the *Trico Products* doctrine, it would not -- one week prior to the Perkins decision -- have denied *certiorari* in the SCM case

case where the issue was squarely presented" (Defendants-Appellees Brief Page 29).

Defendants then went on to cite six prior denials of *certiorari* by this Court*

It would seem that the First, Second, Third and Sixth Circuits are applying one rule of law with respect to standing to sue under Clayton Act Section 4, 15 U.S.C. Section 15 and the Fourth, Eighth and Ninth Circuits are applying another. But even in those very Circuits which apply the restrictive standing rule, dissents are being voiced. See *SCM Corporation v. Radio Corporation of America*, 407 F.2d 166, dissent of Judge Timbers at 172 (2nd Cir. 1969), *Melrose Realty Co., Inc. v. Loews, Incorporated* 234 F.2d (3rd Cir. 1956) dissent of Chief Judge Biggs on Petition for Rehearing, dissent of Judge Waterman, *infra*, Appendix B, page B12.

The present petition affords this Court not only the opportunity to resolve the question of a franchiser's standing under Clayton Act Section 4, but also the opportunity to sweep away the "embroidered limitations" and "restrictive judicial glosses" which some lower Courts have engrafted upon the Act. These glosses, condemned by this Court in *Perkins v. Standard Oil Co., supra*, have resulted in the anomalous situation so sharply brought out in the dissent of Judge Waterman to wit

Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962) *cert. denied*, 372 U.S. 907 (1963); *Miley v. John Hancock Mut. Life Ins. Co.* 148 F.Supp. 299 (D.Mass.), aff'd. 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957); *Productive Inventions, Inc. v. Trico Products Corp.* 244 F.2d 678 (2nd Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Melrose Realty Co. v. Loew's Inc.* 234 F.2d 518 (3rd Cir.), *cert. denied*; 352 U.S. 890 (1956); *Harrison v. Paramount Pictures, Inc.*, 115 F.Supp. 312 (E.D.Pa. 1953) aff'd 211 F.2d 405 (3rd Cir.), *cert. denied*, 348 U.S. 828 (1954); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir.) 1951) *cert. denied* 342 U.S. 919 (1952)

"Whether particular guilty defendants will pay the full measure of what Congress prescribed, then, turns on how the innocent parties in the affected target enterprise chose to do business' Appendix B, page B27.

2. The decision of the Court below constitutes a contrived and restrictive interpretation of Clayton Act Section 4 and will discourage the private enforcement of the antitrust laws. In fact, the Court below, in disregarding the motive and intention of defendants, has expanded the class of plaintiffs who may now be the remedyless victims of antitrust violations. Such an expansion of the "indirect damage test is not only a vehicle to destroy competition in the nonalcoholic beverage industry, but many other industries as well, e.g., all franchise industries.*

* The Economics of a Treble Damage Case, by Joseph L. Alioto, 32 A.B.A. Antitrust L. J., page 87

"There is a new look in the antitrust arena. Anglo-American roots of the Sherman Act were private lawsuits[1] and we appear to have come full circle. Today private lawsuits, except in the merger field, actually dominate the news of antitrust enforcement. The Supreme Court writes panegyrics to the importance of private actions in the struggle against monopoly.[2] The Ninth Circuit tells us that a "niggardly construction of the treble damage provisions would do violence to the clear intent of Congress."[3] A former head of the Antitrust Division states unequivocally that the private suit is more efficacious than governmental enforcement.[4]"

[1]Anonymous, *The Schoolmaster Case*, Court of Common Pleas, Hilary Term, 1410 Y.B. 11 Hen. IV, F 47, pl. 21.

Anonymous, *The Meat Market Case* Y.B. 11 Hen. VI, F 19, 13, F 25, pl. 2 (1433).

[2]*Radovich v. National Football League*, 352 U.S. 445, 453 (1957).

Lawlor, Trading as Independent Poster Exchange v. National Screen Service Corp., 349 U.S. 322, 329 (1955).

[3]*Flintkote v. Lysfjord*, 246 F.2d 468 (1957).

[4]Statement of Lee Loevinger, Hearings Before a Subcommittee of the Select Committee on Small Business United States Senate on the role of Private Antitrust Enforcement in Protecting Small Business. 85th Cong. 2d Sess. (1958), p.7.

Lack of standing is a defense commonly invoked by antitrust defendants. The Court below has expanded that defense into a new dimension by its statements regarding intention and has clearly set forth a rule whereby a defendant may indirectly accomplish that which is unavailable directly.

This Court has long been clear as to the result which Congress intended in enacting Section 4 of the Clayton Act. In the case of *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) this Court succinctly restated that Congressional intention as:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."

Other recent rulings by this Court are indicative of the conscious efforts to aid antitrust plaintiffs. These rulings have rejected "niggardly construction" *Veh v. General Petroleum Corp.*, 382 U.S. 54 (1965), narrowed frequently used defenses which burden plaintiffs by long and complicated proceedings and which reduce the effectiveness of antitrust actions, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and reject rulings by Courts of Appeals which threaten the effectiveness of the private action as a means of enforcing antitrust policy. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

The majority opinion below is squarely in contradiction to the most recent rulings of this Court and the dictates of common sense. It expands the defense of lack of standing into a monstrous license to put competitors out of business. Clearly it must be reversed.

Petitioner urges this Court to reject the majority opinion below and adopt the well reasoned approach of Judge Waterman's dissent – a dissent which does not impose glosses upon Section 4 of the Clayton Act, but rather interprets the Section according not merely to the letter of the Clayton Act, but also and more importantly to the spirit of it and the opinions of this Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CAPTION

OPINION

66 Civ. 1454

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DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, ESQS., New York, New York, Attorneys for Defendant CANADA DRY CORP. (EDWARD N. SHERRY, KENNETH LAURENCE and ROBERT A. MEISTER, ESQS., of counsel).

RYAN, D. J.

Defendants move for summary judgment dismissing the complaint with prejudice, urging that the pleadings and plaintiff's responses to the defendants' interrogatories establish that plaintiff may not maintain this action under Section 4 of the Clayton Act (Title 15 U.S.C. Section 15) because plaintiff (1) lacks standing to sue for the injuries alleged, and (2) has not been damaged in its business or property within the meaning of the antitrust laws. Defendants urge that undisputed facts established by plaintiff's own allegations and sworn statements require the granting of the relief sought.

This motion of defendants for summary judgment was filed on July 19, 1968. It was followed by service of a motion of the plaintiff for leave to serve an amended complaint. It has been stipulated that, if such leave is granted, defendants' motion shall be deemed to be addressed to the complaint so amended; if such leave be denied, the motion shall be considered addressed to the complaint as originally filed. In either event, we must pass upon plaintiff's motion before we reach the defendants' motion for summary judgment.

Plaintiff's attorneys describe the amendments in the proposed complaint as "being sought to make more sufficient and definite the statement of the causes of action of plaintiff."

Specifically, plaintiff states that it seeks to include allegations in (a) Paragraph 11, concerning its plans for national marketing of its products; and in (b) Paragraph 18, concerning the scope of plaintiff's sales, and in (c) Paragraphs 25 to 37, concerning defendants' illegal acts with respect to plaintiff and plaintiff's injuries therefrom.

Although Rule 15(a), F.R.C.P., requires that leave to amend a pleading shall be freely given, the amendment must be sought in good faith and must be granted when justice requires. A finding of good faith must have at least *prima facie* showing of a possibility of the amender's ability to establish factual support for the new matters sought to be pleaded. There must also be a showing that the amendment is not sought as a dilatory measure and that the defendant will not be prejudiced.

Before we examine the proposed amendments, we must consider another of the avalanche of motions which have descended upon us in this action. This brings us to plaintiff's motion for leave to amend or supplement its answers, sworn to on December 15, 1966, by its President William F. Adler, to Interrogatories Nos. 9, 10, 24 and 46, prepounded by defendant CANADA DRY CORP. Adler is and has been the general manager and counsel of the corporation. He is also a member of the New York Bar and a partner in the law firm of Greenburg & Adler, the attorneys for plaintiff in this action. One of his affidavits submitted states that for a period of several years, he served as a Referee in Bankruptcy in Ohio. It appears that he has had a varied experience in the practice of the law and in business affairs.

The amendments proposed to be made in these answers, plaintiff says in this notice of motion served on October 17, 1968, "are necessitated by failure of the original answers, through inadvertence, to include all the matters necessary for complete responses and to remove opinion language from said interrogatory answers.....". However, in plaintiff's memorandum, plaintiff states that this information "should be included in Plaintiff's answers, especially in light of Defendant's motion for summary judgment in this action." Plaintiff seeks to plead new matter to defeat defendants' motion for summary judgment.

We must consider these motions in light of the history of the action. The docket and file show the following:

May 19, 1966 - complaint filed.
October 11, 1966 - answers of defendants served.
July 19, 1968 - defendants move for dismissal.
September 13, 1968 - plaintiff moves for leave to amend its complaint.
October 17, 1968 - plaintiff moves for leave to amend its answers to CANADA DRY's interrogatories.

It is not disputed that the genesis of plaintiff's last two motions was Judge Mansfield's decision on plaintiff's prior motion.

On February 23, 1968 plaintiff served interrogatories upon defendant CANADA DRY and on May 31, 1968 it served amendments to these interrogatories. CANADA DRY served objections to nine of these interrogatories: Nos. 7, 8, 16, 23, 30, 31, 32, 33 and 34, and brought these objections on for motion hearing and ruling on July 25, 1968. The matter was heard and referred by Judge Mansfield to Pretrial Examiner Potter as Special Master, to hear and report. A report was filed on September 10, 1968 and Judge Mansfield, acting on that report, sustained the objections to the nine interrogatories. The report, approved by Judge Mansfield, stated in part that:

> "Defendant Canada Dry's objections to interrogatories 7, 8, 16, 23, 30, 31, 33 and 34 are limited to the claim that under the complaint and plaintiff's answers to interrogatories, the matters covered by these interrogatories are clearly irrelevant. This argument proceeds on a theory that in the complaint plaintiff alleges that it is a franchisor of beverages and that defendants' actions tended to substantially reduce plaintiff's sales. Further, in its answers to interrogatories plaintiff admits that only on limited occasions did it directly sell non-alcoholic carbonated beverages to customers. Based on these statements Canada Dry claims that since plaintiff is a franchiser, its business is restricted to the issuing of franchises to sell a named brand beverage and that accordingly sales of the bottled goods by Canada Dry are irrelevant.
>
> "At the hearing counsel for plaintiff argued that the activity of defendants had precluded plaintiff from entering into the field and that accordingly the interrogatories are proper.
>
> "I would recommend that the motion be granted in all re-

spects since under the complaint in its present form it would appear that the matters inquired into by these interrogatories are irrelevant. Obviously, if plaintiff amends its complaint to include an allegation similar to the one raised by its counsel, the interrogatories would appear proper."

It is obvious that the observation that an appropriate amendment to the complaint would make the stricken interrogatories proper, prompted the motion to serve an amended complaint. Later, proceedings by the defendants on the motion for summary judgment brought on plaintiff's application to amend its answers to CANADA DRY's interrogatories.

It seems best that we first examine the amendments sought to be pleaded in the proposed amended complaint.*

These amendments to the complaint concern the nature of plaintiff's business and alleged damage, which plaintiff has claimed to be "lost profits estimated at $500,000 during the period since January 1, 1963." Defendants contend they are conclusory allegations sought to be pleaded without any statement of evidence to support them and contradict allegations in the original complaint and in plaintiff's sworn interrogatory answers. There is ample to support defendants' contentions and to lead to a conclusion that the plaintiff's motions are made in an attempt to avoid the consequence of defendants' motion for summary judgment.

THE PROPOSED AMENDED COMPLAINT

The original complaint alleges a single count for alleged violation of the Sherman Act (Title 15 U.S.C. Sections 1 through 7, 15); the Clayton Act (Title 15 U.S.C. Sections 12

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* This motion to amend the complaint comes 27 months after this action was filed, almost 2 months after defendants' motion for summary judgment and several weeks after plaintiff served its papers in opposition to defendants' motion for summary judgment. The motion also comes after almost two years of pretrial discovery which included interrogatories and cross-interrogatories by all the parties, as well as depositions taken of plaintiff and of both defendants. No showing is made by the plaintiff that the amendments plead new matter in the nature of newly discovered evidence.

through 27); and the Robinson-Patman Act (Title 15 U.S.C. Sections 13, 15).

The amended complaint pleads four counts (labeled as claims, which term we shall use for clarity) against one or both defendants; and alleges that "Claim First" is brought under the Clayton Act (Title 15 U.S.C. Sections 12, 22, 26), the Sherman Act (Title 15 U.S.C. Sections 1, 2) and the Robinson-Patman Act (Title 15 U.S.C. Section 13) against both defendants; that "Claim Second" is brought against the COCA COLA COMPANY in tort to recover damages for inducement of breach of contract; that "Claim Third" is brought "for slander of property or malicious interference with business relations and similar acts of unfair competition against one or both defendants; and that "Claim Fourth" is brought in tort "in order to recover damages from one or both defendants for *'Prima Facie'* tort." But in the amended complaint, the following added allegations are set forth that "Claims Second through Fourth are incidental to Claim First" and that in these claims there is diversity jurisdiction.

The original complaint alleges that plaintiff is a franchiser of beverages sold under the "Billy Baxter" trademark and that it distributes flavor extracts to its franchise bottlers who mix these extracts with carbonated water and bottle a finished product. It also alleges that COCA COLA dominates the industry in the United States as a franchiser and bottler; that CANADA DRY occupies a similar, though lesser position as a franchiser and bottler of mixes and that, by agreement, both avoid genuine competition against each other's "primary product lines"; and that these defendants have acted in concert to exclude plaintiff "from the normal channels of interstate commerce."

The allegations of the original complaint, when read with plaintiff's answers to defendants' interrogatories, attempt to state first a claim for recovery of damages alleged to have been sustained by plaintiff in respect to "lost profits" by plaintiff's licensed bottlers on sales of carbonated beverages to six named users; second, a claim for damages sustained by reason of interference by CANADA DRY with a marketing program in Pittsburgh, involving "Sealtest Foods"; third, a claim that defendants' acts made it "unable to operate" and forced it to try to sell its business and a claim for injury resulting from alleged obstruction by COCA COLA of an attempted sale to a third party.

As to the first two specifications of alleged damages, defendants contend, and we hold properly so, that plaintiff is without standing to sue; as to the third specification, that, since the alleged attempt affects the business and stock of the plaintiff, the claim, if there be any, is vested in the stockholders of plaintiff and not plaintiff.

We find the crux of the amended complaint set forth in paragraphs 10 and 11 so as to restate the nature and extent of plaintiff's business and expand it beyond the former pleading and statements of plaintiff in response to defendants' interrogatories.

Plaintiff, in response to interrogatories propounded by defendant CANADA DRY, further stated that:

> "The Company has no plants or....facilities (other than its administrative offices in New York and Pittsburgh). A description of the business carried on at the company's offices is the purchase of beverage extracts and the sale of same to franchised bottlers, with related advertising and promotional activities. On a few occasions, the company has purchased bottled beverages from one or more of its franchised bottlers for resale." (Response to CANADA DRY's Interrogatory 9).

and it added in response to Interrogatory 10 that:

> "The company neither manufactured, bottled, distributed nor sold products, except as described in response 9 above. The products (are) manufactured, bottled, distributed and sold by the company's franchised bottlers...".

The form of plaintiff's franchise or license agreement is attached to its answers to COCA COLA's interrogatories. It is sufficient here to note only (a) that the bottlers were obligated to purchase flavor ingredients from plaintiff; (b) to pay royalties to plaintiff based upon the number of cases of beverages sold by the bottlers; and (c) that the licensed bottlers were granted the exclusive right to use the "Billy Baxter" mark on their bottled beverages in a specified area. The license also provided that the licensed bottlers were to be independent operators and with no power to act for, represent or bind "Billy Baxter." At no time was plaintiff any part of the manufacturing or marketing operations of its licensees.

We find that plaintiff has in its answers to interrogatories judicially admitted in this action that the injury plaintiff al-

leges arose from its business operations only as a franchiser.

Paragraph 11(b) of the proposed amended complaint alleges, in part:

> "The nature and extent of such interstate commerce engaged in by Plaintiff during the times complained of herein was:
>
> .....
>
> (b) sales to retailers in the state of Pennsylvania, New Jersey, New York and Ohio, and West Virginia of both flavored carbonated beverages and mixers purchased by plaintiff from bottlers franchised by it."

As bearing upon the merits of the additional matters sought to be pleaded, the following facts disclosed by research of defendants' attorneys are to be considered:

1. Plaintiff filed the Articles of Incorporation with the Corporation Bureau of the Department of State of Pennsylvania on December 7, 1962. The purpose of the corporation is thus stated:

   "3. The purpose or purposes of the corporation are to sell, lease, transfer, assign or grant franchises to bottlers of the authority to produce and bottle beverages of all kinds under the formulas and trade mark of Billy Baxter."

2. The purposes and powers of the plaintiff are still the same and have not been enlarged or broadened.

3. Under Article XVI, Section 6, of the Pennsylvania Constitution, plaintiff may not engage "in the business of manufacturing, processing, distributing or selling carbonated beverages."

4. Under Section 1303(a) of the Business Corporation Law of New York, plaintiff, although licensed to do business in New York, may not exercise any greater powers than it can in Pennsylvania and therefore may not distribute or sell carbonated beverages in New York.

5. Plaintiff has never qualified to do business in New Jersey, Ohio or West Virginia.

In sum, then, it is of record that plaintiff cannot lawfully transact business of the nature alleged in Paragraph 11(b) of the

proposed amended complaint.

Analysis of the purported retail sales claimed to have been made by plaintiff establishes that they were not in truth sales.

Defendants' motions for summary judgment awoke the plaintiff's lawyer president to realization of the fact that, as a franchiser, plaintiff did not bring itself within the scope of Section 4 as one who could claim anti-trust damages. As a franchiser, plaintiff was outside of the target area for it did not produce, sell, purchase or lease the entire affected competing product in an independent capacity. It has long been held that, as a franchiser, it would be non-suited (*Productive Inventions, Inc. v. Trico Pro. Corp.*, 224 F. 2d 678 (2d Cir., 1955)). To overcome this, plaintiff would plead that it was a manufacturer and retailer and would likewise withdraw its judicial admissions that it operated only as a franchiser. The only trouble with this attempt of plaintiff is that the matters it would now plead in the amendments are both contrary to fact and without factual basis.

I am not unmindful that "summary procedures should be used sparingly in complex antitrust litigation" and that "trial by affidavit is no substitute for trial by jury" (*Peller v. Columbia Broadcasting*, 368 U.S. 464-473 (1962); quoted in *Fortner Enterprises v. United States Steel*, Supreme Court, No. 306 - October Term, 1968, decided April 7, 1969). That is so where motive and intent play leading roles. Standing to sue and absence of injury are not difficult to ascertain *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253). Here, it is patent that the amendments are contrary to facts admitted by plaintiff and which require no further exploration. Claims 2 through 4 described by plaintiff as incidental to Claim 1 also must fall. They are claimed to be a result of the antitrust activities of defendants and to be part of these activites. In addition, it is clear that no proposed sale was in existence which could have been interfered with and that, if the sale was to be of the company stock, the claim would belong to the stockholders. In any event, it is clear that the claims here asserted are part of the antitrust claim and that they are conjectural in that plaintiff is unable to defind what its damages were. I have concluded that summary judgment of dismissal on the merits should be granted to defendants with costs and the Clerk is directed forthwith to enter judgment accordingly.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 697—September Term, 1969.

(Argued April 9, 1970 Decided August 25, 1970.)

Docket No. 34072

BULLY BAXTER, INC.,

Plaintiff-Appellant,

—v.—

THE COCA-COLA COMPANY and CANADA DRY CORPORATION,

Defendants-Appellees.

Before:

WATERMAN and ANDERSON, *Circuit Judges,*
and WEINFELD, *District Judge.**

Appeal from a judgment of the United States District Court, Southern District of New York, Sylvester J. Ryan, *Judge*, dismissing franchisor's treble damage antitrust suit for lack of standing to sue. Affirmed.

* Of the Southern District of New York, sitting by designation.

JAMES V. JOY, JR., Esq., New York, N. Y. (Greenburg and Adler, Lucille J. Becker, Esq., and Edward V. Egert, Esq., New York, N. Y., on the brief), *for Plaintiff-Appellant.*

ALLAN BLUMSTEIN, Esq., New York, N. Y. (Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, and Paul R. Verkuil, Esq., New York, N. Y. on the brief for Defendant-Appellee The Coca-Cola Company; and Dewey, Ballantine, Bushby, Palmer & Wood, Edward N. Sherry, Esq., and Robert A. Meister, Esq., New York, N. Y., on the brief for Defendant-Appellee Canada Dry Corp.), *for Defendants-Appellees.*

ANDERSON, *Circuit Judge*:

Appellant Billy Baxter, Inc., is a Pennsylvania corporation organized in 1962 for the purpose of selling or otherwise granting franchises authorizing the production and bottling of a line of non-alcoholic carbonated beverages under the federally-registered trademark "Billy Baxter." The beverages, which include club soda, quinine water, ginger ale, ginger beer, sarsaparilla, root beer, and "lime 'n quine" (quinine water containing lime), have been produced and sold locally in the Pittsburgh area by others since 1889, bearing the registered trademarks "Red Cross" and "Billy Baxter" since 1900 and 1921, respectively. In December of 1962, the appellant purchased the trademarks and secret beverage recipes, licensed the former owner to continue local production, and announced its intention to expand the availability of Billy Baxter products to new markets by franchising bottlers to manufacture and sell them.

Billy Baxter, Inc., admits that it played a circumscribed role in the subsequent limited expansion of Billy Baxter beverage product distribution, describing its business as "the purchase of beverage extracts and the sale of same to franchised bottlers, with related advertising and promotional activities."[1] From its office in Pittsburgh, Billy Baxter, Inc., bought various flavored extracts, which had been manufactured by others, and resold them to its franchised bottlers. The bottlers then manufactured the beverages by mixing these extracts with carbonated water, syrups, or other ingredients according to the specified secret formulae. The franchisee-bottlers sold the beverages in their geographic territories, remitting specified royalties to Billy Baxter, Inc., based on the number of cases of their products which they sold. The appellant franchisor had no plants or facilities other than its administrative offices in Pittsburgh and New York (where its president practices law); and in the normal course of business it "neither manufactured, bottled, distributed nor sold products" other than the extracts supplied to its franchisees.[2]

Four bottlers were licensed as Billy Baxter franchisees between 1962 and 1964, serving parts of Pennsylvania, Ohio, West Virginia, New Jersey and New York; and others also were approached and asked to test markets for

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1. Response to Canada Dry interrogatories, ¶9.

2. *Id.*, ¶10. In ¶9, Billy Baxter, Inc. noted that "on a few occasions" it purchased bottled beverages from one or more of its franchised bottlers for resale. These occasions were elaborated in ¶24, which stated:

> "The Company did not sell products to customers who purchased from the company except in two instances. For a period of approximately three months during 1964, the company sold directly to Thoroughfare Supermarkets, Inc. (sales volume $10,925.00) and Giant Eagle Supermarkets, Inc. (sales volume $993.00), Pittsburgh, Pa. In addition, the company sold direct to Brussels Casino, Inc. (in 1964, sales volume $3,340.00) and Devil's Head Cafe (in 1965, sales volume $1,236.00), at the New York World's Fair."

the products. But Billy Baxter operations, which required that franchisees use a uniquely-shaped non-returnable bottle and distribute products which traditionally "sold at a higher-than-average cost,"[3] did not flourish. The appellant's gross income from sale of extracts and royalties, as well as "occasional" resale of some of its franchisees' bottled beverages,[4] rose from some $18,000 during its first year to $45,500 in its second; but thereafter it declined precipitously, with three of the four bottlers ultimately relinquishing their franchises.

In 1966, Billy Baxter, Inc., commenced this action against the Coca-Cola Company and Canada Dry Corporation, Delaware corporations which manufacture various products and license bottlers to do the same, sweepingly alleging that they have violated various parts of the Sherman, Clayton, and Robinson-Patman Acts.[5] It contended that these two firms restrained competition in the "non-alcoholic carbonated beverage industry" in the five aforementioned states by agreeing to "avoid genuine competition with each other's primary product line." It further charged that they "acted in concert . . . to exclude plaintiff from the normal channels of interstate commerce, and through discriminatory, unfair and unlawful price concessions, discounts, gifts and allowances directed specifically to plaintiff's customers, induced them to exclude plaintiff's products from their places of business." The complaint alleged that these

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3 Affidavit of William F. Adler, president of Billy Baxter, Inc., July 17, 1968, p. 2.

4 See note 2, *supra*.

5 The original complaint alleged a single count for violation of the Sherman Act, 15 U.S.C. §§1-7, 15; the Clayton Act, 15 U.S.C. §§12-27; and the Robinson-Patman Act, 15 U.S.C. §§13, 15. The proposed amended complaint would have alleged four counts, the only one of which based on antitrust violation cited the Clayton Act, 15 U.S.C. §§12, 22, 26; the Sherman Act, 15 U.S.C. §§1, 2; and the Robinson-Patman Act, 15 U.S.C. §13.

actions, followed by supplementary improper activities,[6] injured Billy Baxter, Inc., by causing "lost profits" estimated at $500,000; and it sought this amount trebled as damages.

Thereafter both Coca-Cola and Canada Dry served written interrogatories on Billy Baxter, Inc.; and the appellant's answers significantly narrowed the scope of the activities which were alleged to have caused harm to the franchisor's business. Billy Baxter, Inc., explained that the alleged market division injured it because Canada Dry was able to concentrate economic power in the "mixer market," using "advertising, price concessions, pricing of product and similar practices" to maintain market domination. But it added that these activities affected it specifically because of practices aimed at its "customers," listing as known examples three Pittsburgh hotels, two distributors, and a cocktail lounge allegedly induced to cease purchasing Billy Baxter products. In fact, none of these was a customer of the appellant Billy Baxter, Inc. Instead, each was a retail outlet or distributor which had purchased beverages from one of the franchised bottlers, which in turn paid royalties to the appellant.

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6 The complaint alleged that damage from the antitrust violations forced Billy Baxter, Inc. to try to sell its business, and that appellee Coca-Cola Co. interfered with this attempt. In its proposed amended complaint, the appellant characterized this and related claims as incidental to its basic claim of antitrust violations. The district court held that because the alleged attempt to sell the franchising business concerned a sale of stock, any claim based on interference would be vested in the Billy Baxter, Inc., stockholders rather than in the company. This holding has not been contested on appeal.

The complaint also alleged that appellee Canada Dry Corp. obstructed a proposed marketing program with a named dairy company; but since answers to the interrogatories disclosed that the program was actually that of Red Raven Corp., the franchised bottler which had owned the Billy Baxter trademark before 1962, the district court considered these allegations in conjunction with the antitrust standing arguments, *infra*.

After both the filing of the appellees' joint summary judgment motion and a special master's report on a motion to strike certain interrogatories, in each of which it was suggested that Billy Baxter, Inc. lacked standing to sue as a franchisor for its own lost profits on its franchisees' sales, appellant moved to amend both its complaint and its revealing answers to the interrogatories. It requested permission to file an amended pleading characterizing itself as a seller of bottled beverages purchased from its own franchised bottlers for resale, deleting its prior reference to "occasional" resales and describing the same two isolated sets of transactions as "substantial" retail sales.[7] Nevertheless, the district court found that this proposed verbal change did not alter the fact that "[a]t no time was plaintiff any part of the marketing operations of its licensees." Conclusory statements to the contrary were found to be without factual basis;[8] and summary judgment was granted because Billy Baxter, Inc. was outside the "target area" of the alleged antitrust activities, the marketing of bottled beverages. *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 47 F.R.D. 345, 349-50 (S.D.N.Y. 1969). We affirm.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the

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7 See note 2, *supra*.

8 The district court also took note of the fact that Billy Baxter, Inc. had stated in its articles of incorporation that its corporate purpose was to sell or grant *franchises* authorizing others to bottle and sell trademarked beverages. The appellees contended below that the Pennsylvania Constitution and New York's Business Corporation Law §1301(a) therefore prohibited Billy Baxter, Inc. from engaging in the business of manufacturing or selling the beverages themselves, and that the appellant never qualified to do business at all in New Jersey, Ohio or West Virginia. *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 47 F.R.D. 345, 349 (S.D.N.Y. 1969).

antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The statutory requirement that treble damage suits be based on injuries which occur "by reason of" antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of damage. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251 (1946); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570, 575-6 (1964). And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages and thereby take a leading role in the enforcement of the prohibition in question. See, e.g., *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 43 F.R.D. 386 (S.D.N.Y. 1967). The private action, intended as "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws," *Perma-Life Mufflers, Inc.* v. *Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), can only serve as an effective deterrent if the courts are able to administer it with some degree of certainty. Contourless rules of caus-

ation would pose the threat of a parallel relaxation of the standard of business behavior enforced by the allowance of treble recovery. Consequently, a plaintiff must allege a causative link to his injury which is "direct" rather than "incidental" or which indicates that his business or property was in the "target area" of the defendant's illegal act. *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2 Cir.), *cert. denied* 395 U.S. 943 (1969); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2 Cir. 1955), *cert. denied* 350 U.S. 936 (1956). These terms do not provide talismanic guides to decision, but they do indicate the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities. See generally Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-on Defense*, 32 A.B.A. Antitrust L. J. 5 (1966); Timberlake, *Federal Treble Damage Antitrust Actions* §§4.02, 4.03 (1965).

In this case the only facts which Billy Baxter, Inc. alleges concern the use of improper methods to persuade retail outlets to buy products other than those manufactured and sold by the bottlers paying royalties to appellant.[9] There is no suggestion that any party approached the franchised bottlers and attempted to induce them to terminate their relationship with the appellant, or that any related steps were taken to interfere with the appellant's own franchising business. Cf. *Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. 1959). The only "target area" of legitimate activity indicated by the franchisor is the marketing of bottled beverages.

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9 The appellant stated in its answers to interrogatories that details of specific concessions, discounts, gifts, or allowances to the named retail beverage outlets, or to other beverage purchasers, were largely known only to the guilty appellees; but it did not contend that other types of conduct were involved.

The appellant's claim to standing is not strengthened by the argument that the "target" was the line of Billy Baxter products rather than a specific "area" of economic activity in which the bottlers were engaged. Reference to the products as a target simply points to the self-evident fact that antitrust violations might do some damage to all the entities connected with their production and distribution. It is still necessary to examine a given plaintiff's role in these processes to determine whether it has the requisite relationship to the type of wrong alleged. Billy Baxter, Inc. was not only one step removed from the link in the production-distribution chain receiving the first impact of the alleged misconduct, but also it cannot claim to be a firm with comprehensive responsibilities for and identification with the beverages. Cf. *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9 Cir. 1955). It manufactured no products, and the bottlers did not act as its agents in doing so.[10] The franchisor merely licensed the information needed for the manufacture of the beverages, supplied ingredients which still others had manufactured, and left further production activities to its franchisees.[11] It would be meaningless to state that Billy Baxter, Inc. simply elected to carry on "its" business by authorizing others to bottle and sell the beverages, because the franchisor consciously structured the production-distribution

10 The bottlers' franchise agreements specified that they were not made agents or representatives of the franchisor "for any purpose whatsoever."

11 The appellant did reserve the right to inspect the processes and conditions at the bottlers' plants, and especially to have access to the bottlers' auditing systems and financial records. The franchise agreement stated that the "volume control," guaranteed by these inspection rights, was the franchisor's "primary means of appraising licensee's performance of this agreement," since it determined the size of royalties owed. Apart from the language of this agreement, the record contains no mention of the nature of the relations of Billy Baxter, Inc. with the bottlers.

process in a way which limited its own activities in order to gain the benefits of certain specific rights and liabilities.[12] Thus the district court did not enforce a standing rule allocating economic loss to arbitrarily-determined vertical levels of an enterprise, but relied upon the fact that the appellant had expressly limited itself to a level outside the economic target area of the offense. See *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

Similarly, the appellant's standing is not improved by the suggestion that the appellees, Coca-Cola Company and Canada Dry Corporation, were "its" competitors. The word "competitor" is no more instructive than the word "direct," if either is taken out of the context of the facts of a specific case. In its complaint, Billy Baxter, Inc. contends that both of these firms are manufacturers as well as franchisors of independent bottlers; and it is not clear whether the alleged discriminatory price concessions and discounts are claimed to have been made to promote the sale of beverages actually bottled by one of the appellees,[13] an activity in which it does not compete with the appellant, or to benefit sales in the five specified states by their franchised bottlers. In any case, even if the appellees violated the law to help themselves or their franchisees at the expense of the bottlers who sold Billy Baxter products, while knowing that this would also be an effective way of depriving a rival franchisor of royalties, the causal link between the type of violation alleged and an appropriate

12 For example, Billy Baxter, Inc. apparently did not qualify to do business itself in three of the states in which beverages using its trademark were marketed. See note 8, *supra*.

13 The concessions and discounts alleged are attributed entirely to appellee Canada Dry Corp. The appellant contends that the Coca-Cola Co. is a participant in antitrust violations because of the alleged market division.

plaintiff would still be lacking in this suit. An interference with the marketing of beverages may interrupt profitable relationships and thereby harm a party which in effect "markets" franchises and ingredients, but the connection is not sufficiently compelling to support a treble damage suit.

The position of Billy Baxter, Inc., as a franchisor attempting to recover for this type of antitrust violation is not significantly different from that of a patent licensor suing for royalties lost because of injury to its patentee, *SCM Corp.* v. *Radio Corp. of America, supra; Productive Inventions* v. *Trico Products Corp., supra;* or of a supplier of ingredients suffering from a loss caused by an antitrust violation damaging the manufacturer and seller of a product, *Volasco Prods. Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6 Cir. 1962), *cert. denied* 372 U.S. 907 (1963); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc., supra.* Although Billy Baxter, Inc. licenses a trademark rather than a patent and also engages in certain advertising and promotional activities in support of this mark, we do not think this distinction suffices to give it standing to sue for damage caused by illegal interference with the marketing of its franchisees' products.[14] See, *Nationwide Auto Appraiser Service, Inc.* v. *Association of Casualty & Surety Cos.*, 382 F.2d 925 (10 Cir. 1967).

Summary judgment was an appropriate remedy in this case, because the factual questions of motive and intent were not material to the appellant's standing. No genuine

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14 The appellant stated that it kept no separate records of advertising related to particular products, and its expenditures for various types of advertising and promotion on behalf of its trademark also were not itemized. The franchisor noted that an unspecified part of this advertising expense represented the cost of material supplied to the bottlers for use in their own local advertising.

issue as to any material fact remained, because the nature of the appellant's injuries and the appellees' alleged activities were fully developed during two years of discovery and disclosure. Assuming the truth of appellant's extensive material factual allegations, they were nevertheless insufficient to show standing to sue. See *SCM* v. *Radio Corp. of America, supra.* Denial of the motion for leave to serve an amended complaint two months after filing of the appellees' summary judgment motion was also proper, since the verbal changes suggested would not have cured the absence of factual support for a showing of standing, indicated by prior judicial admissions.

The judgment is affirmed.

WATERMAN, *Circuit Judge*, dissenting:

I respectfully dissent from the action of my distinguished brethren in affirming the judgment entered below.

They agree with the respected judge below that, even if plaintiff-appellant's factual allegations are testimonially supportable, these allegations are not sufficient to demonstrate that appellant had standing to complain against the defendants.

I believe the plaintiff-licensor has standing to sue. I find it rather strange these days to deny access to a court of law to a plaintiff who alleges facts that show it has suffered compensable damage by reason of the action of others. Thus I am constrained to believe that my brother judges have accepted an anachronistic judicial gloss upon the phrase "by reason of" as that phrase appears in 15 U.S.C. §15 (1964 ed.), a Code section derived from prior antitrust statutes, the Sherman Anti-Trust Act of July 2, 1890, 80 years old, and Section 4 of the Clayton Act of October 15, 1914, 55 years old.

Initial, or priming, coats of gloss were put on even before 1914, as when the Third Circuit was adjudicating a case brought against a well-known corporation pursuant to Section 7 of the Sherman Anti-Trust Act of 1890. The plaintiff's action there was demurred to and the lower court's judgment sustaining the demurrer was affirmed by the Third Circuit. In holding that this plaintiff had no standing to sue, it was said:

> There must exist some barrier which will effectually prevent such a multiplicity of suits as the plaintiff's position suggests, and we believe not only that that barrier exists, but that it is found now just where it was prior to the passage of the act in question. *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (3 Cir. 1910).

Should we not have in mind that those were the days when "privity" was king and even *MacPherson* v. *Buick Motors*, 217 N.Y. 382 (1916) had not been written? Loeb was a stockholder and creditor of a corporation which had been ruined as a result of defendant's antitrust violations. The court reasoned, as I have just set out, that the antitrust statute was not intended to grant causes of action to a multiplicity of plaintiffs who could not have maintained suits against the defendant for compensable damages prior to its passage. It held that as the corporation was the party primarily injured and a stockholder's interest in lost profits is derivative, the private antitrust cause of action, as with any other derivative cause of action, lay with the corporation. Accord, *Ames* v. *American Telephone & Telegraph Co.*, 166 F. 820 (C.C. D. Mass. 1909). Too, the court ruled that the same general principle applied to a creditor of an insolvent corporation which falls

victim to antitrust violations, for creditors' interests are protectable by the trustee in bankruptcy who may institute an antitrust action in the creditors' behalf. The court, although appearing to recognize that Loeb had been damaged, wrote that any injury which he received was "indirect, remote, and consequential," *id.* at 709, and the underlying reasoning of the decision (which I hasten to point out I am not denigrating) contemplated the existence of another person, the corporation or the trustee, each of which had a fiduciary relationship to plaintiff as stockholder or to plaintiff as creditor and who, *directly* harmed by defendants' conduct, was capable of bringing suit and in doing so would be protecting a stockholder's or a creditor's interest. The fiduciary, the proper party to institute the action, then, as envisaged by the court, would act as a conduit through which the stockholder's and creditor's damages would flow, for in the long run a successful suit by the corporation or its representative would presumably accrue to the benefit of its stockholders and its creditors. As to the standing of stockholders the court appeared to fear that if both those persons who possess truly derivative claims *and* the corporation, too, were allowed to bring suit, the defendant would be subject to damages in excess of treble the amount of the total actual damages inflicted upon the corporate entity and its stockholders by the antitrust conduct. *Id.* at 823.

Further development by judicial construction of §4 of the Clayton Act has led to disqualification of employees of a corporation from suing for the consequences they suffered in the aftermath of antitrust violations committed in the competitive market of which their employer was a part. See, e.g., *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51 (9 Cir. 1951), *cert. denied*, 342 U.S. 919 (1952);

Westmoreland Asbestos Co. v. *Johns-Manville Corp.*, 30 F. Supp. 389 (SDNY 1939), *aff'd*, 113 F.2d 114 (2 Cir. 1940). But cf. *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 43 F.R.D. 386 (SDNY 1967). Similarly, a lessor or landlord has been denied standing to sue for decreased rental payments due to antitrust activity affecting the business engaged in by the lessee, regardless of "whether the tenant [lessee] be a party to the violation . . . or not." *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685, 690 (SDNY 1963), *aff'd*, 332 F.2d 269 (2 Cir. 1964); *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F.2d 518 (3 Cir.), *cert. denied*, 352 U.S. 890 (1956). Contra, in circumstances where the lessee is a party to the antitrust violation, *Congress Building Corp.* v. *Loew's, Inc.*, 246 F.2d 587 (7 Cir. 1957). Patent licensors have likewise been held ineligible to sue for loss of royalty income because of antitrust violations directed at the licensee's business, *SCM Corp.* v. *Radio Corp. of Am.*, 407 F.2d 166 (2 Cir.), *cert. denied*, 395 U.S. 943 (1969); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2 Cir. 1955), *cert. denied*, 350 U.S. 936 (1956), the case relied upon by the court below, see 47 F.R.D. 345, 350 (SDNY 1969) and by my brothers. In like fashion, suppliers of ingredients to customers who have fallen victim to antitrust violations have been denied the benefit of an antitrust suit. *Volasco Prods. Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6 Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 906 (D. Mass. 1956). It would seem now that even franchisors are placed in the same category. *Nationwide Auto Appraiser Service, Inc.* v. *Association of Casualty & Surety Companies*, 382 F.2d 925 (10 Cir. 1967).

There seems to have emerged from a major portion of the cases interpreting the antitrust statutes a talismanic rule of lack-of-standing, presumably based in some fashion upon those now famous words "by reason of." If the plaintiff suffers injury from the defendant's illegal antitrust conduct, but the plaintiff is somehow separated from the defendant by the presence of an intermediate person who has also fallen victim to that conduct, the plaintiff's injury is given the label of an "indirect," "remote," or "consequential" injury. The label then dictates the outcome of the case and the plaintiff is denied a recovery regardless of the extent or the nature of plaintiff's loss, or of any other facts and circumstances, and regardless of whether a fiduciary relationship existed between plaintiff and the intermediate person. Many courts, so accepting label disposition, have tended thereby to view the standing-to-sue requirement in general terms and thus have denied all plaintiffs who fall into certain classes of persons—lessors, landlords, stockholders, corporate officers, creditors, suppliers, franchisors, licensors—antitrust protection by holding that when the business and property interests of such plaintiffs are injured because of injuries to the competitive market of persons with whom they are related or connected the plaintiffs' position vis-a-vis the offending defendants is "indirect." This is not to say, of course, that denying a plaintiff access to court by "label disposition" will always lead to a deplorable deprivation. Nevertheless, in deciding whether a plaintiff has standing to pursue the federally created cause of action codified in 15 U.S.C. §15 it seems to me that perhaps the use by courts in antitrust opinions of inherited decisional labels may have obfuscated the positions of some plaintiffs so as to have denied them the recoveries which fact-analysis might have indicated they should have obtained.

Several courts, however, have resisted the adoption of labelous rules of standing-to-sue and have looked to some extent behind the "indirectness" label in an effort to preserve the basic policy considerations that give the standing-to-sue requirement its viability. See, e.g., *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 688-689 (8 Cir. 1966); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (4 Cir.), *cert. denied*, 385 U.S. 934 (1966). One of these cases, decided some years ago, *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9 Cir. 1955), involved an antitrust action by a manufacturer of automobile polish who sold its product under the trade name of "Wax Seal" to enfranchised, but independently owned, distributors, who in turn resold the "Wax Seal" to independent service stations. The defendant, a sponsor of various automobile polishes and waxes other than "Wax Seal" was alleged to have violated the antitrust laws by entering into "exclusive dealing" agreements with service station operators thereby causing an unreasonable restraint of trade in the car wax industry and, in particular, causing restricted sales of "Wax Seal" by plaintiff's enfranchised distributors, thereby diminishing the distributors' demands for "Wax Seal" from plaintiff. The court was undaunted by the fact that plaintiff stood in the shoes of one "indirectly" injured and held that plaintiff was entitled to maintain the action. In reaching this conclusion the court characterized the issue this way:

> "[W]as Karseal within the 'target area' of [defendant] Richfield's illegal practices . . . ? Assuming Karseal was 'hit' by the effect of the Richfield antitrust violations, was Karseal 'aimed at' with enough precision to entitle it to maintain a treble damage suit under the Clayton Act?" *Id.* at 362.

The defendants in *Karseal* applied illegal restraints at the level of the retail outlets, as defendants allegedly did in this case. The independent distributors in *Karseal* stood between the plaintiff and the retailers, as the bottlers stand between Billy Baxter and the retailers in the instant case. The *Karseal* court found that:

> Primarily the operation and effect of the illegal practices was on the products (including Karseal's wax) which were competitive to the Richfield sponsored products. The impact was on the market. The gist of the violation was the prevention or impeding of the sale of these competitive products. *Id.* at 364.

Finally, the court observed:

> To say to a manufacturer of wax that he may have the protection of the antitrust laws in private litigation if he hires salesmen for his product, and not have such protection if he decides to contract with a distributor, would appear to be an unequal application of the law and unjustified dictation as to how he operated his business. *Id.* at 364-365.

Appellees would distinguish *Karseal* because in that case the plaintiff supplied the finished product while in this case it is the plaintiff's franchisees who make up the finished products and bottle the beverages. The majority at page 4173 would distinguish *Karseal* by saying appellant "cannot claim to be a firm with comprehensive responsibilities for and identification with the beverages." This analysis might have merit if plaintiff had not furnished the secret formulae extracts which served to make Billy Baxter's beverages unique and which gave the Billy Baxter beverages their competitive edge in the soft-drink industry. I

submit, however, that Billy Baxter does have "comprehensive responsibilities for and identification with the beverages" sold under its brand name trademark.

Billy Baxter, as was Karseal, is the nerve center or the center of operations for the production and marketing of a "brand name" product. Billy Baxter's franchisees, as did Karseal's franchisees, perform functions ancillary to and in furtherance of, their franchisor's primary function and purpose, that of providing the consumer public a different and distinct product line and of promoting its products' good will and acceptability in a competitive market.

Several considerations lead me to believe that the majority is wrong in its assessment that appellant's relationship with its bottlers is not sufficiently close to bring it within the protection of the antitrust laws.

The majority points out that apart from the terms of Billy Baxter's written agreement with its bottlers, "the record contains no mention of the nature of the relations of Billy Baxter, Inc. with the bottlers." (Majority opinion, footnote 11). Unlike the majority, however, I find that the agreement referred to is of special significance. In relevant part the licensing agreement provides:

> 4. Licensee [bottler] shall strictly comply with the instructions, formulas and directions of BILLY BAXTER, which BILLY BAXTER may give from time to time in relation to the preparation, handling, bottling and distribution of BILLY BAXTER beverages . . . . Licensee shall furnish BILLY BAXTER with as many samples of BILLY BAXTER beverages as may be requested to enable BILLY BAXTER to test Licensee's compliance with the instructions hereinbefore described, and Licensee shall permit representatives of BILLY BAXTER, at all reasonable times, to inspect and investigate the proc-

esses, methods and conditions of Licensee's operation of its plant, and operation of the financial aspects of Licensee's business . . . .

The majority concludes that plaintiff's reserved right to inspect is primarily designed to guarantee "volume control" whereby performance could be ascertained and royalties determined. (Majority opinion, footnote 11.) I think it is a fuller statement to add that the language of the agreement allows plaintiff to direct unqualifiedly the bottlers in their "preparation, handling, bottling and distribution of BILLY BAXTER beverages," and that inspections are not only designed to measure "volume" but in addition to insure "quality control." Plaintiff has an important stake in achieving and in insisting upon uniform standards of quality among the products its bottlers produce and distribute. This is not only very good business but is required legally. The majority fails to recognize that inasmuch as plaintiff owns the federally registered trademark that identifies the Billy Baxter beverages in the market, plaintiff is required to exercise reasonable supervision and control over licensees it allows to use the trademark so as to insure uniform standards of quality in all the Billy Baxter beverages produced by various bottlers, for lack of reasonable "quality control" works an abandonment of the licensor's registration of its trademark. Lanham Act, 15 U.S.C. §1051 et seq., *Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2 Cir. 1959).[1]

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1 The legislative scheme may be briefly described. Section 5 of the Lanham Act, 15 U.S.C. §1055 provides:

> Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration,

Therefore, instead of merely licensing "information" to its licensees and then quietly sitting back to collect royalties, plaintiff was obligated to play a continuing role in overseeing its licensees' performance for plaintiff, as the trademark owner, was responsible, according to federal law, to the ultimate consumer lest the "public . . . be unwittingly deceived," *id.* at 367, and the penalty for failure to take active steps to supervise and control its licensees would be the loss of its registered trademark. Moreover, this affirmative duty that a licensor owes to the public to prevent diverse standards of product quality may well lead to a reciprocal liability for any injuries suffered by

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provided such mark is not used in such manner as to deceive the public.

The concept of control is introduced by the Act's definition of "related company." 15 U.S.C. §1127:

> The term "related company" means any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used.

This court in *Dawn Donut* set forth the necessity for this policy of the Lanham Act:

> Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities (citing cases). If the licensor is not compelled to take some reasonable steps to prevent misuses of his trademark in the hands of others the public will be deprived of its most effective protection against misleading uses of a trademark. The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licensor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the Act is in part designed to prevent. See Sen. Report No. 1333, 79th Cong., 2d Sess. (1946). Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees. 267 F.2d at 367.

a consumer because of a lack of effective "quality control," and indeed may thereby constitute the relationship of the licensor to its licensee, depending upon the extent of the control reserved by the licensor, to be that of a principal liable for the acts of its agent. E.g., *Nichols* v. *Arthur Murray, Inc.*, 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 (1967). See Note, The Franchisor as Plaintiff in Treble Damage Actions: An Antitrust Anomaly, 49 B.U.L. Rev. 322, 335-337 (1969); Note, Liability of a Franchisor For Acts of the Franchisee, 41 So. Cal. L. Rev. 143 (1967).

In short, the majority's classification of Billy Baxter, Inc. as an entity which "consciously structured the production-distribution process in a way which limited its own activities in order to gain the benefits of certain specific rights and liabilities" (majority opinion pages 4173-4174) ignores the Lanham Act's imposition of affirmative duties that Act requires of licensors and which may substantially break down whatever insulation from liability a trademark licensor might have otherwise previously enjoyed. I, therefore, find it rather anomalous to conclude that an enterprise owning a brand-name is not sufficiently identified with and not sufficiently responsible for the consistent quality of its brand-name products to have standing to prosecute an antitrust cause of action and yet, on the other side of the coin, is so sufficiently identified with these same brand-name products that the Congress, so as not to have the public deceived, has imposed affirmative responsibilities upon it to police its licensees in order to protect the integrity of the product in the consumer market.

Assuming the facts plaintiff alleges in its complaint are provable I cannot think of a more strained use of reason and of logic than to say that Billy Baxter was not "aimed at" by the defendants and was inadvertently hit as an

"innocent bystander." See *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649 (1969); *Karseal Corp.* v. *Richfield Oil Corp., supra* at 363. Can there be any doubt, again assuming the alleged facts to be provable, that the defendants' ultimate objective was to undermine the competitive position enjoyed by Billy Baxter trade name products in the beverage market? These allegations do not claim that defendants' aim was to eliminate competition in the beverage *bottling* industry but to eliminate the Billy Baxter brand-name beverage products from competition with defendants' brand-name beverage products. Here, in fact, under the allegations of this case, the bottlers are the businessmen who are secondarily or incidentally "hit." This proposition may be demonstrated by assuming that, because of defendants' conduct, the market for Billy Baxter beverages has been eliminated. Of course the bottlers who have been bottling those beverages are unable to continue doing so. However, it does not necessarily follow from the demise of the Billy Baxter beverage market that the bottlers are eliminated from the pursuit of their business of bottling beverages. There still may exist a market for bottling, although that market may be that of bottling some other company's beverages—even perhaps the beverages of these defendants. There are, however, no alternatives open to Billy Baxter; its business is destroyed because its ability to compete has been destroyed.

Billy Baxter, therefore, is the principal, and the intended, victim of the defendants' illegal conduct, for the purpose for which defendants conspired was to keep Billy Baxter's trade name beverages off retail shelves; the defendants did not say to retailers, "don't stock beverages *bottled* by companies A, B, or C." The object of the defendants' conspiracy was not to put certain bottlers out

of business; it was to scuttle Billy Baxter and the Billy Baxter trademarked brand-name in the relevant competitive market. Of course when the Billy Baxter business was scuttled Billy Baxter's franchisees would be damaged, but this would be so only because they happened to be bottling Billy Baxter products, not because they were the ultimate and principal targets aimed at. It was the plaintiff franchisor, not the plaintiff's franchisees, who was aimed at with such deadly accuracy and precision.

The fact that Billy Baxter provided for a financial structure between itself and its franchisees that contemplated the outright sale of the flavor extracts and a royalty for every case of beverages sold rather than providing for payment to its bottlers of a fee for bottling and distributing the beverages has no more significance than the outright sale of automobile polish to distributors had in *Karseal* v. *Richfield Oil Corp., supra.* To hold otherwise would be an unwarranted exaltation of form over substance. Billy Baxter's way of doing business did not insulate it from loss so that its elimination from the relevant market injured only its franchisees, for its way of doing business did not cause any unusual allocation of risks of financial loss between it and its franchisees if the market for Billy Baxter products should decline. The franchisees were not contractually obligated to purchase extracts from Billy Baxter except on a need-as-you-go basis. If the demand for Billy Baxter beverages slackened a Billy Baxter bottler's demand for extracts would diminish in like proportion. The ratio of commercial risk between them would be essentially the same whether Billy Baxter acted as its own distributor and paid the bottlers for bottling or whether it was agreed that title to the finished beverages would vest in Billy Baxter prior to distribution to the consuming public. The

only risk of loss not assumed by Billy Baxter that the franchisees faced with respect to the finished products was the risk of loss of inventory if the market for Billy Baxter should collapse overnight, not a very significant factor over the long run.

This brings us to the point of inquiring whether this Billy Baxter case can be meaningfully distinguished from the apparent holding in the case of *Productive Inventions, Inc.* v. *Trico Prods. Corp., supra*, upon which my colleagues rely. Although the court in that case recognized that:

> [N]o hard and fast rule can be laid down in these situations as the line between direct and incidental damage is not always definable with clarity . . . .

and characterized the issue presented by the pleadings as a "limited" one, the court held that a patentee who has granted an exclusive license to a manufacturer, upon a royalty basis, could not maintain a treble damage action for recovery of damages for loss of royalties on sales that might have been made by the licensee save for defendants' antitrust violations. *Id.* at 679, 680. Relying on decisions denying relief to stockholders, employees, creditors and landlords, the court, in sweeping language, adopted the classical "indirect," "incidental," damage formula and denied the licensor-plaintiff standing to sue.

Our court held this even though the court appeared to recognize, *id.* at 680, n. 1, that "direct" damages suffered by the licensee for loss of sales and "indirect" damages suffered by the licensor for loss of royalties on the lost sales were different kinds of damages and appeared to recognize that under its holding neither the licensor nor the

licensee could recover for the loss of the licensor's royalties, *id.* at 680.[2]

The *Trico Products* result is, I suggest, motivated by a judicial adherence to a notion that inasmuch as Congress has provided that affected plaintiffs may recover threefold damages, i.e., may benefit by a "windfall," the courts should frustrate the legislation by preventing some persons damaged by proscribed unfair competition from sharing in the "windfall." The argument makes sense, of course, as long as one person is available to bring the antitrust suit, and the extent of the damages that he may recover is allocable between him and others similarly damaged because of the manner in which he and they are doing business. In such a situation the policy of Congress to encourage private antitrust actions by permitting the recovery of treble damages is not thwarted even if only the most directly affected person is allowed to bring the suit.

But if the person "most directly affected" does not have a relationship with another affected person of the sort that will permit him to recover the other's damages it is the defendant that reaps a "windfall." This "windfall" would seem to occur when conspiratorial defendants happen to direct antitrust activity at a vertically non-integrated

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2 This result appears to have been reached without having considered the reasons the early courts found dispositive based upon a justified fear that persons in privity with each other would recover for the *same* damages. As is said in 69 Harv. L. Rev. 575, 576 (1956) the result in *Productive Inventions* v. *Trico Products* permitted a defendant to escape a liability it should have been accountable for:

> Since the licensee was not obligated to pay the royalties to the plaintiff unless the patented articles were sold, the royalties could not be recovered by the licensee in a suit for damages based on the lost sales; they were a cost which the licensee had not incurred and which would have reduced its profit margin had the sales been made. The plaintiff has no remedy other than a suit under the antitrust laws. Thus, the defendant is permitted to escape liability for much of the harm caused by its unlawful conduct.

enterprise rather than at a completely integrated one. In the latter case, a defendant guilty of antitrust conduct must pay three-fold the actual damages it inflicts. In the former, such a defendant need only pay three-fold the damages it inflicts on the first independently organized tier of the affected industry, thereby avoiding the full measure of its illegal undertakings. Whether particular guilty defendants will pay the full measure of what Congress prescribed, then, turns on how the innocent parties in the affected target enterprise chose to do business. Nothing in the congressional history of the antitrust legislation even remotely suggests that such an anomalous standard should be applicable in this field.

Of course it is apparent that a line must be drawn somewhere, as in all damage actions, for there is always a point where proof of damages becomes too difficult or too speculative. In the antitrust area that point is surely reached when the one claiming to be damaged by another's antitrust activity has too tenuous a relationship to the competitive market affected. Perhaps this consideration justifies the line drawn in *Productive Inventions* v. *Trico Products*—at least our court as of now has so drawn the line—but for the reasons I have stated I believe the line there drawn was drawn without examining the rationale behind the labels there relied upon, and, in any event, that case ought not support a decision moving the line over to bar out Billy Baxter. Billy Baxter's relationship to the relevant market is far from tenuous. Billy Baxter is directly in the retail market where it alleges defendants' violations occurred because it pre-sells its trade named products in the consumer's mind and, presumably in order to protect its own interest, makes available business advice and promotes product quality control through inspections of its franchisees; the franchisee-bottlers, therefore, do

not have the "inalienable right to *mismanage*" their own businesses. See Slater, Some Socio-Economic Footnotes on Franchising, 11 B.U. Bus. Rev. 19, 21 (1964). In contrast, the licensor in *Trico Products* was passive in the relevant market and left every aspect of the business to the manufacturer licensee.

I believe that this circuit has already reached or may have surpassed the permissible high watermark in this area in *Productive Inventions* v. *Trico Products*. The Supreme Court from time to time has instructed that the protection afforded by antitrust legislation is not to be restricted by niggling precepts or by artificial limitations. As far back as 1948 the Supreme Court in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) stated:

> The statute [Sherman Act] does not confine its protection *to consumers, or to purchasers, or to competitors, or to sellers.* Nor does it immunize the outlawed acts because they are done by any of these. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. . . . (Emphasis added.)

See statements of similar effect in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961); *Radovich* v. *National Football League*, 352 U.S. 445, 453-454 (1957). See also *Perkins* v. *Standard Oil Company of California*, 395 U.S. 642 (1969).

I would, therefore, reverse the judgment below entered after the grant of summary judgment motion and would remand for further pleadings and proceedings.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BILLY BAXTER, INC.,

Plaintiff,

66 Civ. 1454

- against -

THE COCA COLA COMPANY and CANADA DRY CORPORATION,

JUDGMENT

Defendants.

The defendant having moved for summary judgment and the plaintiff having moved to serve an amended complaint, and the said motions having come on to be heard before the Honorable Sylvester J. Ryan, United States District Judge, and the Court thereafter on May 28, 1969 having handed down its opinion decision in favor of the defendants, it is,

ORDERED, ADJUDGED and DECREED: That the defendants THE COCA COLA COMPANY and CANADA DRY CORPORATION have judgment against the plaintiff BILLY BAXTER, INC., dismissing the complaint on the merits with costs to be taxed.

Dated: New York, New York
May 28, 1969

/s/ John Livingston
Clerk

APPENDIX C

CAPTION

MOTION TO REARGUE

Motion denied; so ordered.

July 16th, 1969

/s/ Sylvester Ryan
U.S.D.J.

APPENDIX D

CAPTION

NOTICE OF APPEAL

Filed Aug. 13, 1969

SIRS:

NOTICE is hereby given that BILLY BAXTER, INC., Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Sylvester J. Ryan, District Judge, granting defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure entered in this action on the 28th day of May, 1969, Motion for Reargument pursuant to Rule 59 of the Federal Rules of Civil Procedure denied by order dated July 16, 1969.

YOURS, etc.,

Greenburg & Adler

APPENDIX E

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of August, one thousand nine hundred and seventy.

Present: HON. STERRY R. WATERMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges
HON. EDWARD WEINFELD,
District Judge

BILLY BAXTER, INC.,

Plaintiff-Appellant,

v.

THE COCA COLA COMPANY and
CANADA DRY CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

APPENDIX F

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In the

Supreme Court of the United States

October Term, 1970

No. 989

BILLY BAXTER, INC.,
Petitioner,

v.

THE COCA-COLA COMPANY and
CANADA DRY CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 18, 1971

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In the

Supreme Court of the United States

October Term, 1970

No. 989

BILLY BAXTER, INC.,
Petitioner,

against

THE COCA-COLA COMPANY AND
CANADA DRY CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court is reported at 47 F.R.D. 345 (S.D.N.Y. 1969). The opinions of the Court of Appeals are reported at 431 F.2d 183 (2d Cir. 1970). All opinions are printed as appendices to the petition.

Question Presented

Did the courts below properly apply the well established standing to sue rule in deciding that petitioner, who was not in the business of manufacturing, selling or purchasing carbonated beverages, could not sue for alleged conspiracy and restraints in that line of commerce?

Statement of the Case

This is a treble-damage action, commenced by petitioner Billy Baxter, Inc. ("Billy Baxter") in May, 1966 against respondents for alleged violations of the antitrust laws* in

* 15 U.S.C. §§ 1-7; 15 U.S.C. §§ 12-27; 15 U.S.C. §§ 13, 15.

the non-alcoholic carbonated beverage business. Petitioner, however, was not in the business of manufacturing, selling or purchasing such products.

After two years of pre-trial discovery, respondents moved for summary judgment on the ground that the undisputed facts developed during discovery established that petitioner had no standing to sue respondents under the antitrust laws. Thus, the facts were to be determined from the evidence before the District Court, not the mere allegations contained in petitioner's complaint and briefs. In deciding the motion, the District Court reviewed numerous affidavits, answers to interrogatories and depositions brought forth by respondents, as well as affidavits of petitioner's president and answers to interrogatories brought forth by petitioner. The District Court (Ryan, J.) granted respondents' motion and the Court of Appeals affirmed.*

The undisputed facts are, as follows: Billy Baxter, a Pennsylvania corporation, was organized in 1962. Its business activities consisted of the following:

> (a) it licensed and "franchised" four independent bottlers, serving parts of Pennsylvania, Ohio, West Virginia and New York, to use the Billy Baxter trademark and to sell non-alcoholic carbonated beverages thereunder; and
>
> (b) it purchased from manufacturers flavor ingredients used in the production of non-alcoholic carbonated beverages which it resold, without rebottling, to its "franchised" independent bottlers, who then manufactured, bottled, distributed and sold the beverages.

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* In the Court of Appeals, Judge Anderson wrote the majority opinion; Judge Weinfeld of the District Court, sitting by designation, concurred. Judge Waterman dissented.

Billy Baxter, therefore, was only a "franchisor" or licensor and a supplier of ingredients, and its only "customers" were its "franchised bottlers." As the opinion in the Court of Appeals pointed out:

> "[Billy Baxter] manufactured no products, and the bottlers did not act as its agents in doing so. The franchisor merely licensed the information needed for the manufacture of the beverages, supplied ingredients which still others had manufactured and left further production activities to its franchisees."*

Billy Baxter's business activities did not flourish. Its operations required its franchisees to use a uniquely-shaped non-returnable bottle and to distribute products which "sold at a higher-than-average cost." Several vendors acknowledged difficulties in marketing the products because of a lack of consumer appeal.

In its first year of operation, petitioner's gross income was approximately $18,000. Gross income rose to $45,500 in the second year, but declined drastically thereafter. Ultimately, three of the four "franchised" independent bottlers relinquished their franchises.

Billy Baxter filed its complaint against respondents in May, 1966, seeking treble damages of $1,500,000 for lost profits estimated at $500,000 over the period beginning January 2, 1963.** The complaint in sweeping language

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* Petitioner's printed license agreement with its "franchisees" explicitly provided that each licensee was to be an independent operator and not "the agent or representative of Billy Baxter for any purpose whatsoever."

** The damages claimed by petitioner were loss of licensing royalties and loss of resale profits. Petitioner estimated that it lost profits of $38,000 in 1963, $70,000 in 1964, and $130,000 in 1965. The estimates were not supported by any detailed information and should be compared to petitioner's actual gross income which never exceeded $50,000 a year during the time in question.

charged violations of the antitrust laws and made the general allegation that the conspirational acts of respondents restrained competition in and tended to create a monopoly of the "non-alcoholic carbonated beverage industry" in five states.

Respondents moved for summary judgment in July, 1968, arguing that the damages claimed by petitioner—loss of licensing royalties and loss or resale profits on flavor ingredients—did not give rise to standing to sue because they amounted to no more than a claim of remote injury which petitioner suffered derivatively by reason of an alleged injury to some third person.

Some two months later (and some 27 months after the action was commenced) petitioner countered by moving for leave to amend its complaint. In an effort to avoid the clear case authority establishing petitioner's lack of standing to sue under the antitrust laws, the proposed amended complaint alleged an antitrust violation virtually indistinguishable from the original complaint, with one exception; petitioner sought to allege—contrary to admissions earlier made, without any affidavits or other evidentiary support, and as the courts below found, contrary to facts established by independent affidavits and public records—that it was in the business of selling bottled beverages bearing its trademark to retail outlets in the alleged five state market.*

---

* Facts of public record indicated that petitioner was not in the business of selling carbonated beverages in the alleged five state market. Petitioner's Pennsylvania articles of incorporation did not authorize it to sell carbonated beverages in Pennsylvania. Petitioner could not lawfully sell such beverages in New York since it was not authorized to do so in its state of incorporation. N.Y. Bus. Corp. L. § 1301(a) (McKinney's Consol. Laws 1963). Public records in New Jersey, Ohio and West Virginia revealed that petitioner had not qualified to do business in any of those states.

Both motions were argued in the District Court in October, 1968. Two weeks after argument and more than a month after petitioner had moved to amend its complaint, it served still another motion. To extricate itself from its prior judicial admissions concerning its business activities, petitioner sought to amend its answers to interrogatories to withdraw the admissions contained therein.

The District Court denied petitioner's motions for leave to amend its complaint and its interrogatory answers, finding that the facts were as stated in petitioner's original interrogatory answers as shown by uncontroverted, independent evidence, and it granted respondents' motion for summary judgment.

The Court of Appeals affirmed in all respects.

Reasons for Denying Certiorari

This case involves nothing more than the application of well-settled rules to a particular set of facts. It was correctly decided in the courts below.

There is no conflict among the courts of appeals on the legal issues involved, and this case presents no important federal questions for this Court to review.

I.

THE STANDING REQUIREMENT

A. *The Rule Followed in All Circuits.*

For many years, the federal courts have uniformly held that the right to sue under Section 4 of the Clayton Act (15 U.S.C. § 15) is limited to persons who are in the business where the alleged antitrust violations occurred

and whose injuries are "directly" caused by the illegal activity. It is not enough that the ultimate effects of the activity, filtered through many layers of the economy, allegedly caused some loss. Plaintiff must show that his injury was not "indirect" or "remote," but rather that he actually was in the business in which the alleged illegal activities occurred.

The principles behind the "direct injury" requirement have been recognized and applied in many cases in numerous circuits. For example:

First Circuit:

"The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15" *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957). See also *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

Second Circuit:

"Those harmed only incidentally by antitrust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover." *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). *Accord, SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 170-71 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

Third Circuit:

"[T]he courts recognize that the Act does not give a right of action to every one who can trace a financial loss, however remote, to a violation of the antitrust

laws." *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954). *Accord*, *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956).

Fourth Circuit:

"If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 419 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966).

Sixth Circuit:

"It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the supplier's customer." *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

Ninth Circuit:

"[t]he rule is that one who is only incidentally injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). *Accord*, *Hoopes* v. *Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967).

Tenth Circuit:

"The newer and the older cases both present much the same terms to work with although expressed in somewhat different language. . . . [W]e hold that under the authorities the plaintiff here has not alleged

a cause of action under the Clayton Act because its position relative to the injuries resulting from the alleged acts of the defendants is too remote.

"... [I]ts damages resulting from the acts of defendants would come about 'indirectly,' 'remotely,' or as 'derivative damages.'" *Nationwide Auto Appraiser Service, Inc.* v. *Association of CdS. Cos.*, 382 F.2d 925, 928-29 (10th Cir. 1967).

The well-established rule, illustrated by the foregoing cases, has long been a limitation upon the sanction of penal treble damages. The reasons behind it are simple and compelling. It can be (and it has been) argued that every restraint of trade in some degree injures every person involved in the economic and social community. Customers, creditors, stockholders, employees, suppliers, patent and trademark licensors—in short, each and every person dealing with and deriving gain from a restrained enterprise—may arguably be said to suffer injury from the restraint.

The courts have properly concluded, however, that Congress did not intend to allow anyone who could assert a remote connection with an alleged restraint of trade to maintain a suit for treble damages. Without some limitation to "direct" injuries, courts would be literally flooded with private antitrust suits. Defendants would face possible liability far in excess of the threefold limitation as a result of multiple judgments. Since it is relatively easy to allege a restraint of trade, yet very expensive to defend against such suits, unsuccessful businessmen would be encouraged to make money by filing suit and using litigation costs to force settlement.

To avoid a flood of treble damage actions by persons with remote claims, the federal courts have unanimously

held that the treble damage recovery is available only to parties in the business where the alleged antitrust wrongs occurred and who are immediately and directly injured by alleged antitrust wrongs.

B. *Application of the Rule to This Case.*

As applied to facts comparable to the case at bar, the standing rule has always produced the same result—a finding that the plaintiff lacked the requisite standing to maintain his action, whether he be characterized a "franchisor" or licensor or supplier of ingredients. There is no case to the contrary.

Petitioner's business activities as a licensor and its claim of injuries based on loss of royalties is no more compelling than the claims of other licensor antitrust plaintiffs who have been held to lack standing. In *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956), a patent owner who had granted an exclusive license to manufacture the patented invention sued a competitor of the licensee. Plaintiff argued that it had been damaged through lost royalties since the licensee's sales were diminished because of defendant's acts. The District Court and the Court of Appeals both concluded that the patent owner whose alleged injury was loss of royalties because of antitrust violations affecting the business of the licensee could not maintain the action.

A similar fact pattern yielded a similar result in *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (patent licensor not in the business). See also *Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. 1959).

Petitioner's business activity as a "franchisor" is also no more compelling than that of the "franchisor" plaintiff in *Nationwide Auto Appraiser Service, Inc.* v. *Association of C. & S. Cos.*, 382 F.2d 925 (10th Cir. 1967). There plaintiff granted exclusive territorial franchises to independent businessmen who then engaged in the automobile damage appraisal business using plaintiff's name. Plaintiff did not itself engage in any appraisal activities, but derived its income from payments by the franchisees based on a percentage of their gross receipts. Defendants, an association of insurance companies, were charged with conspiring to sponsor a single damage appraiser in certain areas, thereby injuring the franchisees and ultimately depriving plaintiff of income. The Court of Appeals held that defendants were entitled to summary judgment. The court said:

> "The facts of the case before us and our view of the law issue dictate that we follow the general standards of the decided cases in such comparable situations rather than seek to extend the right to recovery or to relax the rule in instances of summary disposition." 382 F.2d at 929.

Finally, petitioner's business as a supplier of ingredients and his claim of injury based upon loss of resale profits on ingredients is substantially weaker than that of other suppliers who have been held to lack standing, since petitioner, unlike the others, did not even manufacture the ingredients but merely purchased and resold them.

In *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956), a manufacturer of flavor extracts which were used as a major ingredient in making beverage syrup sued because of antitrust violations affecting the business of the syrup manufacturer. Plaintiff sup-

plied 90% of its output to the allegedly injured manufacturer, and the supplying and manufacturing corporations were commonly owned by one individual and his wife. The District Court (Wyzanski, J.) held that plaintiff could not sue for its loss of revenues from the sale of its ingredients since it was not in the business directly affected by the antitrust violation.

See also *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

The decision below was clearly correct and requires no further review.

C. *The Asserted Conflict.*

Petitioner's assertion of a conflict among the circuits concerning the standing rule is based on a misapprehension of what a "conflict" means.

Petitioner apparently sees a conflict because in some cases standing was found to exist, while in others it was found lacking. But these differences in ultimate result occurred not because of any disagreement as to the proper legal rule to be applied, but arose solely from the different facts involved in each case.

The cases cited by petitioner in no way indicate any conflict among the circuits respecting the application of the standing rule to facts similar to those presented here. In each case in which plaintiff was held to have standing, plaintiff was in the business in which the antitrust violations occurred and was directly injured thereby. For example, *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955), was a suit by the manufacturer of automobile wax

against a major gasoline company which also promoted sales of car waxes. Plaintiff alleged that defendant had engaged in illegal restraints of trade to suppress competition from plaintiff's products. Defendant argued that since plaintiff distributed the finished product manufactured by it through independent distributors, the asserted losses were remote and indirect and, therefore, plaintiff lacked standing to sue. The court held that "the operation and effect of the illegal practices was on the products (including Karseal's wax) which were competitive to the Richfield sponsored products. . . . [T]he illegal acts were directed against the manufacturers and distributors of the competing products, including Karseal's wax." *Id.* at 364. Clearly, plaintiff in *Karseal* was engaged in the manufacture and sale of the very product involved in the antitrust violation.

The opinion below in this case took note of the *Karseal* case and pointed out the factual differences from *Karseal* and the case at bar. The Court wrote:

> "Billy Baxter, Inc. was not only one step removed from the link in the production-distribution chain receiving the first impact of the alleged misconduct, but also it cannot claim to be a firm with comprehensive responsibilities for and identification with the beverages. Cf. *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9 Cir. 1955). It manufactured no products, and the bottlers did not act as its agents in doing so."

Similarly, *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F. 2d 679 (8th Cir. 1966), is another case in which plaintiffs had standing because as in *Karseal* (and unlike the case at bar), plaintiffs manufactured the finished products which were the object of the trade restraints. There, plaintiffs, a group of small dairies, sued a dairy-

farmer cooperative which had conspired to fix prices in the fluid milk market. One of the plaintiffs, whose standing was challenged, distributed its milk through a separate, but identically owned, sales company. In discussing several cases where standing was lacking, the Court of Appeals stated:

> "We feel, however, that these cases are different factually from the present one and themselves indicate that the facts of the present case would be critically distinguishing. Bergjans and its sales company do not occupy the relationship of raw material supplier and manufacturer. Bergjans put out the finished product. All the milk processed by Bergjans flows through this sales company. The latter performs no processing or manufacturing. All this demonstrates that there was directness of competition between Bergjans and Sanitary, that any recovery by Bergjans is not in the nature of a windfall, and that Bergjans' injury is something more than remote, is not derivative but direct, and is the proximate result of Sanitary's misdoing." *Id.* 688-89.

South Carolina Council of Milk Producers v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966), is yet another case that turned on its facts, since plaintiff's product—raw milk—was found to be "essentially the equivalent commodity" of the defendants' product—fully processed milk. *Id.* 418. There several raw milk producers, were, therefore, held to have standing through their trade association, to sue a number of wholesale and retail grocers who had distributed milk at "unreasonably low prices," *id.* 417, in an attempt to monopolize trade. In reaching its conclusion the Fourth Circuit cited and followed the decision of the Second Circuit in *Productive Inventions, Inc.* v. *Trico Prods. Corp.*, *supra*.

Petitioner's assertion that cases in this Court conflict with the decision below is equally unfounded. In *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), plaintiff was engaged in the sale of gasoline, the product which defendant sold at prices claimed to be discriminatory. Thus, *Perkins* did not involve the issue of whether derivative injuries suffered as a result of activities in another business gave rise to standing to sue.

The *Perkins* opinion does not even remotely suggest that this Court intended to abolish the standing to sue requirement in antitrust actions or that it intended to overrule the long line of cases which established that requirement.*

There is nothing in the case at bar indicating that this Court should review a decision merely involving application of the well-established standing rule.**

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* Petitioner's citation of other decisions in this Court is equally inappropriate. *Radovich* v. *National Football League*, 352 U.S. 445 (1957), involved only the applicability of the federal antitrust laws to professional football. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) dealt with restraint of trade through refusals to grant certain "seals of approval" and the issue of whether a treble-damage plaintiff is obliged to prove a "public injury" in addition to plaintiff's own economic injury. No issue of standing was presented in either case.

** This Court has denied certiorari in at least seven cases involving application of the standing rule. See *SCM Corp.* v. *Radio Corp. of America*, *supra*, *cert. denied*, 395 U.S. 943 (1969) (certiorari denied one week before decision in *Perkins*); *Volasco Prods. Co.* v. *Lloyd A. Fry Roofing Co.*, *supra*, *cert. denied*, 372 U.S. 907 (1963); *Miley* v. *John Hancock Mutual Life Ins. Co.*, *supra*, *cert. denied*, 355 U.S. 828 (1957); *Productive Inventions, Inc.* v. *Trico Prods. Corp.*, *supra*, *cert. denied*, 350 U.S. 936 (1956); *Melrose Realty Co.* v. *Loew's, Inc.*, *supra*, *cert. denied*, 352 U.S. 890 (1956); *Harrison* v. *Paramount Pictures, Inc.*, *supra*, *cert. denied*, 348 U.S. 828 (1954); *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 989

BILLY BAXTER, INC.,

Petitioner,

v.

THE COCA COLA COMPANY and
CANADA DRY CORPORATION,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This reply brief is submitted to appraise the Court of the recent judicial acknowledgement by the United States Court of Appeals for the Ninth Circuit of the conflict between the circuits on the standing requirement of Section 4 of the Clayton Act (15 U.S.C. Sec. 15). It is respectfully submitted that this acknowledged conflict mandates a resolution by this Court and belies respondents' attempt in their Brief in Opposition to dispose of this controversy by their own fiat.

THE CONFLICT IN THE CIRCUITS

In the recent *per curiam* opinion of the United States Court of Appeals for the Second Circuit in the case of *Fields Productions, Inc. v. United Artists Corp.* - F.2d - (2nd Cir., September 8, 1970), the Circuit Court, in denying the petitioner standing under Sec. 4 of the Clayton Act as its full opinion stated:

> "The judgment of the District Court is affirmed on the opinion of Judge McLean filed on May 27, 1969, Docket No. 68 Civil 198. See also *Billy Baxter, Inc. v. The Coca Cola Co. and Canada Dry Corp.* - F.1d - (2 Cir. August 25, 1970)"

The District Court in the *Fields Productions* case had held that a producer of a motion picture lacked standing to sue for damages sustained by reason of an alleged block booking arrangement under which a motion picture exhibitor refused to license the showing of the producer's picture to television stations unless other pictures were also televised. Applying the same reasoning as used in the lower courts in the instant case, the distributors (franchisees) were held to be in the target area of the violation while the producer's injury was branded "incidental".

While the Second Circuit ratified the majority opinion below as the law of its forum, the Ninth Circuit has taken a stand 180^{o} in the opposite direction.

In the very recent case of *Mulvey v. Goldwyn* - F.2d - (9th Cir., October 20, 1970, Petition for Rehearing, denied, December 1, 1970) the Ninth Circuit reversed the lower court's dismissal of plaintiff's antitrust claim for lack of standing under Clayton Act Sec. 4, 15 U.S.C. Sec. 15. In *Mulvey*, the plaintiff, sole owner of certain motion pictures, brought suit for antitrust damages sustained by reason of defendant's block booking of his films.

In rejecting defendant's arguments regarding plaintiff's

standing as "specious" the Court unqualifiedly stated:

> "We disagree with the contrary conclusion reached on the standing issue by the Second Circuit, *per curiam*, in *Fields Productions, Inc. v. United Artists Corp.* (Sept. 8, 1910 - F.2d - "

Clearly a split exists between the Second and Ninth Circuits on the standing issue. It is also clear that to merely say a plaintiff's injury must be "direct" rather than "indirect" serves only to announce a result; it is not a reliable tool by which the result may be reached. Respondents' mere enunciation of this result in their Brief in Opposition only serves to "beg the question" presented by this petition. The majority and dissenting opinions below and the wide diversity of opinion in the Circuits can only be described as decisions in search of a principle, a principle which can only be supplied by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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The asserted conflict between two other decisions, mentioned for the first time in petitioner's reply brief*, should not be the basis for granting certiorari in this case since the results in those cases turned upon the facts therein and not upon any different view of the law and the factual and legal settings of those cases are quite different from this case.

The decision below held that petitioner is not in the business of manufacturing, selling or purchasing carbo-

* The Petition, which was filed November 20, 1970, does not cite either of the cases upon which petitioner now relies for its asserted conflict, although those cases were decided September 8 and October 20, 1970.

nated beverages and for that reason lacks standing to sue for the alleged restraint of that line of commerce. In *Fields Productions, Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir., 1970), *petition for certiorari filed* (November 20, 1970), the Second Circuit applied the same standing to sue rule and held that the producer of a motion picture allegedly restrained by block-booking was not in the business of exhibiting films or distributing films for exhibition and therefore lacked standing to sue, holding also that plaintiff's alleged damage resulted not from the alleged block-booking but from a contractual dispute over allocating licensing receipts from exhibition. The Ninth Circuit stated it was applying the same standing to sue rule in *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir., 1970). There standing existed because of the different facts; plaintiff was in the business since he had sold the motion pictures allegedly restrained by block-booking and was entitled to his selling price only out of earnings, which he alleged were diminished by block-booking. Not only was Mulvey in the business in question but defendant, the alleged wrongdoer, had a contractual relationship with Mulvey and was acting *de facto* as his agent. The instant petitioner is not in the business allegedly restrained, has no contractual relationship with either respondent, and has no agency relationship with any party.*

Since neither *Mulvey* nor *Fields* (in which a petition for certiorari has been filed) conflicts with the enunciation or interpretation by the court below of the applicable law,

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* Indeed, petitioner's franchise agreements expressly disclaim any agency relationship, as noted in the opinion below.

neither should be a basis for granting certiorari to review this case.

Respectfully submitted,

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TABLE OF AUTHORITIES

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When the Petition for Certiorari was denied, petitioner was indeed disappointed but nevertheless resolved to file a motion for Rehearing asking that the Court grant Certiorari in this case at the time when it would grant Certiorari in the then pending case of *Fields Productions, Inc. v. United Artists Corp.* (Docket No. 1062)

Petitioner's disappointment became compounded when Certiorari was denied in the *Fields'* case, one week after the

denial in the instant case.

Petitioner has always felt that the instant case was not only deserving of, but indeed *required*, granting of Certiorari by this Court.

At issue here lies what has been described in a brilliant dissent by a member of the Circuit Court below as a "talismanic rule of lack of standing" in the interpretation of antitrust law. With no pronouncement from this Court, the Circuits have directly split over the subject matter of this petition. *Mid-West v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir., 1970); *Fields Productions, Inc. v. United Artists Corp.*, 432 F.2d 1010 (2nd Cir., 1970).

Contemporaneously with the filing of petitioner's reply brief petitioner received an indication from the offices of the Solicitor General that the Solicitor General and the Antitrust Division of the Department of Justice did not consider the case meritorious for the filing by the Federal Government of a brief *amicus curiae*.

This determination was soon confirmed by a letter from Dean Griswold. The thoughts that will follow in this motion were conveyed to Dean Griswold by letter before the Court denied Certiorari in the instant case. He replied defending the Court's procedure.

As petitioner views it, there are three areas dominating the Court's grants of Certiorari, 1) Criminal Law, 2) Civil Rights and 3) Petitions in general by the Solicitor General -- leaving the area of Federal civil litigation (in those cases where the Solicitor General does *not* join in petitions for Certiorari) with a diminishingly small share of grants of Certiorari.

Counsel for petitioner has done an extensive study and has ascertained that since the Judge's Act of 1925, no petition for Certiorari by a Federal contractor -- whose work represents in excess of 10% of our nation's gross national product -- has ever been granted over the objection of the Solicitor General. On the other hand, the Solicitor General has achieved Certior-

ari in approximately 40 cases. This study was undertaken by counsel for petitioner in the course of preparation of an as yet unpublished book on the United States Supreme Court and Government Contracts.

This knowledge made him fearful that the instant case, the most important 1970 case in the antitrust field because of the Direct-Indirect damage problem and the clarity of Judge Waterman's dissent, would nevertheless not receive Certiorari.

Petitioner recognizes that because of time limitations creating a condition like that spoken of in the New Testament as "Many are called but few are chosen", few cases are accepted for full argument and opinion -- perhaps 140 cases out of 4,500 in a particular year(projecting the March 5, 1971 Appellate and Pauper Docket figures of 1438 and 1690 cases respectively to June 28, 1971, the expected date of the end of the October 1970 term.) Petitioner is concerned that if Criminal Law, Civil Rights and the Solicitor General each receive one-third of the grants of Certiorari none are available for the Federal civil litigation sector.

The spirit of negativism premising the Certiorari system frankly frightens petitioner. It seems to resemble panning for gold in California in the 1840s or baseball umpires calling balls and strikes. Years ago a fine hitter complained to a fine umpire about an obvious ball that had been called a strike. The umpire answered "You want to know why it's a strike. It's because I called it a strike. Get back up to bat."

There is another sports anecdote that illustrates the problem of negativism. Just after the Second World War, Joseph Kuharich was the Notre Dame coach. He believed his assistant coaches were unduly critical in recruiting High School players for scholarship grants. At a meeting called to consider two ostensible High School players, he ran a game film of them and asked his coachsto observe an end and a halfback. As the film ran, the assistant coaches rejected the end for lack of running speed and inability to cut sharply for

passes. They rejected the half back for comparable reasons. At the end of the film, the camera panned to the score board, showing the game to have been between World War II Service teams, Iowa Preflight and Great Lakes Naval Training Center. The Assistant coaches were outraged by the deception practised on them. The outrage sought to hide the fact that the end and half back rejected by them, respectively, were Elroy (Crazy Legs) Hirsch and Buddy Young, who by the time of the showing of the film were stars in the National Professional Football League and today are deserved members of its Hall of Fame.

Some years ago when the Appellate Docket was about 45% of what it is today, petitioner understands that Anthony Lewis of the New York Times wrote that the Court in conference devoted an average of seven minutes in deciding each petition for Certiorari. Forty-five percent of seven minutes is three minutes which leaves petitioner increasingly uncomfortable with the analogy of the baseball umpire calling balls and strikes.

Quite obviously the Justices' law clerks are playing a significant role in the winnowing process. The role is clear; their intelligence is clear. On the other hand because of youth, their experience is lacking. Their national perspective is extremely doubtful (and also may be the Court's as indicated by the instant case, the *Fields* case and the Government contract cases) -- factors calling into question their wisdom and judgment).

Petitioner asks the Court to hypothesize with it a breakdown of the Certiorari system, with the Court becoming incapable of keeping up its part in the separation of our Government into three parts. At whose initiative should changes come about, the Court or Congress?

The obvious remedy would be either to increase the size of the Court and have it sit in panels or to have an intermediate panel (analagous to the Judicial Panel on Multidistrict Litigation) initially screen cases for Certiorari or even such Panel itself to resolve conflicts between circuits.

The frailty of the Certiorari system is nowhere better exemplified than in this case where the Respondent's principal argument for denial of Certiorari was the number of

earlier denials of Certiorari! How many people have to come knocking at the door before one of them is given an entrance to the foyer? A jurisprudence is growing up in the country announcing law based on denials of Certiorari. It is like the cockle growing among the wheat, eventually to stifle the wheat.

Petitioner has endured many injustices during the course of this litigation. As a "flyer", Respondents filed their motion for summary judgment at the District Court at a time when such a motion was premature because of outstanding discovery unfurnished the petitioner. The motion was intended to delay the furnishing of the discovery (A good example of the status of discovery was Canada Dry's manifestly obvious perjury in answering Interrogatories under oath that it and its advertising agencies did not know the amounts spent by it for advertising of product lines in particular years. Furthermore, Coca Cola never answered petitioner's Interrogatories because of a stipulation that the Interrogatories be answered after completion of the deposition of petitioner's president. Coca Cola, by maneuvers, kept open the deposition. Part of the maneuvering was the Summary Judgment Motion, which has proven a handsome windfall. Trial by Ambush may be dead but it appears that there is now born Summary Judgment by Ambush.) The District Court judge refused to allow petitioner oral argument on the Motion for Summary Judgment. He ignored a letter from petitioner after the argument pointing out that time had run out and he had not allowed petitioner any oral argument. *Dredge Corporation v. Penny*, 338 F2d 456 (1964) It requested oral argument in the event the motion for summary judgment was going to be granted. He took 10 months before deciding the motion in respondents' favor.

Those injustices were nothing compared to the injustice to petitioner from the present Certiorari system, which petitioner submits in its present form and with the present manpower of the Court is not working. This is not a question of someone objecting to a liberal or a conservative Court. It represents a defect in the Court's procedure.

The Court is preeminent among the Courts of the world. Its traditions, even this relatively new tradition of Certiorari, are treated with awe and respect by those who deal with the Court. However, constant reexamination of procedures is the life of the law. Petitioner urges upon the Court that even if this Motion for Rehearing is denied, as a minimum, documents such as this in the future be called something else because to petitioner it seems strange to be asking for a Rehearing.

Returning to the merits of the motion, the Direct-Indirect damage tests being left to the conflict in the Circuits substantially destroys the Sherman Act in those Circuits that follow the instant Second Circuit opinion. Always there is someone else in a predicament comparable to that of a plaintiff in a particular case. If the bottlers as the Second Circuit ruled were the parties directly damaged in the instant cases had themselves sued the Court in their different case could just as readily have found them to be *indirectly* damaged and the Billy Baxter to be *directly* damaged. So it becomes a game where defendants point to a missing damaged person and say "Look he's the one directly damaged. This plaintiff is only indirectly damaged." This defense has become an automatic defense in every antitrust case seeking treble damages. As indicated in the Petition for Certiorari, except for merger cases, the treble damage remedy has become the principal remedy against antitrust violations. The $50,000 criminal fine has been characterized by some as a "license fee" and lower eschelon corporate officers can always be found available to take a vacation at a penitentiary.

Ironically, Courts in the Circuits agreeing with the Second Circuit now allow some Summary Judgments before plaintiffs have discovery to prove themselves to be the intended targets of the antitrust violation. These Courts say that intention is of no consequence thus allowing antitrust preditors to accomplish *indirectly* what they could not accomplish *directly*. Intentional indirect damage thus becomes unactionable and unintentional direct damage is actionable.

One could never imagine that the Antitrust Laws could fall into such a state of disarrary, explainable only in terms of lower Courts granting their brand of Certiorari. Perhaps it can be explained on the basis of a presumed necessity to suppress the treble damage remedy. As petitioner views it the greatest frustration pervading the tragic course of the instant case has not been Respondents' counsels prematurely seeking summary judgment when they knew they were not entitled to it, or the unusual handling of the summary judgment motion by the District Court Judge or the failure of the Second Circuit to conform to the view of the Ninth, Eighth and Fourth Circuits, but rather has been the Certiorari system that has not allowed this case to be heard by the United States Supreme Court.

This leaves our Courts of Appeals truly Federal Courts, harkening back to the days of Articles of Confederation, and, therefore, autonomous and not *National* courts evolving a *national* rule for implementation of a *national* law.

Returning for a moment to the reference to litigation involving Federal contracts, it can fairly be argued that the Courts of Appeals were established in 1890 because of volume of litigation coming to this Court from the settlement of the Civil War contracts. Further, it can fairly be argued that the Certiorari procedure itself was adopted in 1925 because of the volume of such cases coming to this Court from the settlement of the World War I contracts. Accordingly, there *is* irony in the fact that since 1925 no contractor holding a Federal contract has had Certiorari granted in its favor without the concurrence of the Solicitor General.

Petitioner's observations on the Certiorari system have validity only to the extent that its petition for Certiorari merited Certiorari except for time limitations on the present number of Justices of the Court and the absence of a panel of mature judges to screen cases for Certiorari. Petitioner hopes that this brief has indicated the mistake in not granting Certiorari and that the Court will reconsider its denial of Cer-

tiorari and on reconsideration grant Certiorari.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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